STATEMENT

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BEFORE THE

HOUSE SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY

CONCERNING

OVERSIGHT OF THE CONGRESSIONAL REVIEW ACT ON THE TENTH ANNIVERSARY OF ITS ENACTMENT

PRESENTED ON

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Mr. Chairman and Members of the Subcommittee,

I am very pleased to be before you again, this time to discuss a statute, The Congressional Review Act (CRA), that I have closely monitored since its enactment ten years ago yesterday. Your commencement of oversight of this important piece of legislation is opportune and perhaps propitious.

As my CRS Report on the decade of experience under the CRA details, we know enough now to conclude that it has not worked well to achieve its original objectives: to set in place an effective mechanism to keep Congress informed about the rulemaking activities of federal agencies and to allow for expeditious congressional review, and possible nullification of particular rules. The House and Senate sponsors of the legislation made clear the fundamental institutional concerns that they were addressing by the Act:

> As the number and complexity of federal statutory programs has increased over the last fifty years, Congress has come to depend more and more upon Executive Branch agencies to fill out the details of the programs it enacts. As complex as some statutory schemes passed by Congress are, the implementing regulations are often more complex by several orders of magnitude. As more and more of Congress' legislative functions have been delegated to federal regulatory agencies, many have complained that Congress has effectively abdicated its constitutional role as the national legislature in allowing federal agencies so much latitude in implementing and interpreting congressional enactments.
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> In many cases, this criticism is well founded. Our constitutional scheme creates a delicate balance between the appropriate roles of the Congress in enacting laws, and the Executive Branch in implementing those laws. This legislation will help to redress the balance, reclaiming for Congress some of its policymaking authority, without at the same time requiring Congress to become a super regulatory agency.

The numbers accumulated over the past ten years are telling. Almost 42,000 rules were reported to Congress over that period, including 610 major rules, and only one, the Labor Department's ergonomics standard, was disapproved in March 2001. Thirty-seven disapproval resolutions, directed at 28 rules, have been introduced during that period, and only three, including the ergonomics rule, passed the Senate. Many analysts believe the negation of the ergonomics rule was a singular event not likely to soon be repeated. Furthermore not nearly all the rules defined by the statute as covered are reported for review. That number is probably at least double those actually submitted for review. Federal appellate courts in that period have negated all or parts of 60 rules, a number, while significant in some respects, is comparatively small in relation to the number of rules issued in that period.

It was anticipated that the effective utilization of the new reporting and review mechanism would draw the attention of the rulemaking agencies and that its presence would become an important factor in the rule development process. Congress was well aware at the time of enactment of the effectiveness of President Reagan's executive orders centralizing review of agency rulemaking, from initial development to final promulgation, in the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) in the face of aggressive challenges of congressional committees. The Clinton Administration, with a somewhat modified executive order, but with an aggressive posture of intervention into and direction of rulemaking proceedings, continued a program of central control of administration.[1] The expectation was that Congress, through the CRA, would again become a major player influencing agency decisionmaking.

The ineffectiveness of the CRA review mechanism, however, soon became readily apparent to observers. The lack of a screening mechanism to identify rules that warranted review and an expedited consideration process in the House that complemented the Senate's procedures, and numerous

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[1]See, Christopher Yoo, Steven G. Calabresi, and Anthony J. Colangelo, "The Unitary Executive in the Modern Era, 1945-2004," 90 Iowa L. Rev. 601, 690-729 (2005) (detailing the history of presidential control of administrative actions of departments and agencies in the Reagan, Bush I, Clinton and Bush II administrations) (Yoo).

interpretative uncertainties of key statutory provisions, may have detered its use. By 2001, one commentator opined that if the perception of a rulemaking agency is that the possibility of congressional review is remote, "it will discount the likelihood of congressional intervention because of the uncertainty about where Congress might stand on that rule when it is promulgated years down the road," an attitude that is reinforced "so long as [the agency] believes that the president will support its rules."[2]

Compounding such a perception that Congress would not likely intervene in rulemaking, particularly after 2001, has been the emergence of what has been called by one scholar as the "New Presidentialism,"[3] that has become a profound influence in administrative and structural constitutional law. It is a combination of constitutional and pragmatic argumentation that holds that most of the government's regulatory enterprise represents the exercise of "executive power" which, under Article II, can legitimately take place only under the control and direction of the President; and the claim that the President is uniquely situated to bring to the expansive sprawl of regulatory programs the necessary qualities of "coordination, technocratic efficiency, managerial rationality, and democratic legitimacy" (because he alone is elected by the entire nation). One of the consequences of this presidentially centered theory of governance is that it diminishes the other important actors in our collaborative constitutional enterprise. Were it maintained that the Congress is constitutionally and structurally unfit for running democratic responsiveness, public-regardedness, managerial efficiency and technocratic rationality, this scholar's suggested response is: why bother talking with Congress about what is the best way to improve the practice of regulatory government?

In a widely cited 2001 article,[4] the current dean of the Harvard Law School, posits the foregoing notions and suggests that when Congress delegates administrative and lawmaking power specifically to

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[2]Mark Seidenfeld, "The Psychology of Accountability and Political Review of Agency Rules," 51 Duke L.J. 1059, 1090 (2001).

[3]Cynthia R. Farina, "Undoing The New Deal Through The New Presidentialism," 22 Harv. J. of Law and Policy 227 (1998).

[4]Elena Kagan, "Presidential Administration," 114 Harv. L. Rev. 2246 (2001) (Kagan).

department and agency heads, it is at the same time making a delegation of those authorities to the President, *unless the legislative delegation specifically states otherwise*. From this flows, she asserts, the President's constitutional prerogative to supervise, direct and control the discretionary actions of all agency officials. The author states that "a Republican Congress proved feckless in rebuffing Clinton's novel use of directive power - just as an earlier Democratic Congress, no less rhetorically inclined, had proved incapable of thwarting Reagan's use of a newly strengthened regulatory review process."[5] She explains that "[t]he reasons for this failure are rooted in the nature of Congress and the lawmaking process. The partisan and constituency interests of individual members of Congress usually prevent them from acting collectively to preserve congressional power - or, what is the same thing, to deny authority to other branches of government."[6] She goes on to effectively deride the ability of Congress to restrain a President intent on controlling the administration of the laws:

> Presidential control of administration in no way precludes Congress from conducting independent oversight activity. With or without significant presidential role, Congress can hold the same hearings, engage in the same harassment, and threaten the same sanctions in order to influence administrative action. Congress, of course, always faces disincentives and constraints in its oversight capacity as this Article earlier has noted. Because Congress rarely is held accountable for agency decisions, its interest is in overseeing much administrative action is uncertain; and because Congress's most potent tools of oversight require collective action (and presidential agreement), its capacity to control agency discretion is restricted. But viewed from the simplest perspective, presidential control and legislative control of administration do not present an either/or choice. Presidential involvement instead

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[5]Kagan at 2314.

[6]*Id.*

> superimposes an added level of political control onto a congressional oversight system that, taken on its own and for the reasons just given, has notable holes.[7]

Dean Kagan's observations and theories appear to have been almost a blueprint for the presidential actions and posture toward Congress of the current Administration.[8]

The CRA reflects a recognition of the need to enhance the political accountability of Congress and the perception of legitimacy and competence of the administrative rulemaking process. It also rests on the understanding that broad delegations of rulemaking authority to agencies are necessary and appropriate, and will continue for the indefinite future. The Supreme Court's most recent rejection of an attempted revival of the nondelegation doctrine[9] adds impetus for Congress to consider several facets and ambiguities of the current mechanism. Absent review, current trends of avoidance of notice and comment rulemaking, lack of full reporting of covered rules under the CRA, judicial review, and increasing presidential control over the rulemaking process will likely continue.

There have been a number of proposals for CRA reform introduced in the 109th Congress that address more effective utilization of the review mechanism, most importantly a screening mechanism and an expedited consideration procedure in the House of Representatives. Two such bills, H.R. 3148, introduced by Rep. Ginny Brown-Waite, and H.R. 576, filed by Rep. Robert Ney, both provide for the creation of joint committees to screen rules and for expedited House consideration procedures. H.R. 3148 also suggests a modification of the CRA provision that withdraws authority from an agency to promulgate future rules in the area in which a disapproval resolution has been passed with the enactment by Congress of a new authorization. That provision has been seen as a key impediment to the review process. Both proposals are expected to receive further consideration.

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[7]Kagan at 2347.

[8]See Yoo at 722-30.

[9]*Whitman* v. *American Trucking Assn's*, 531 U.S. 457 (2001).